Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

Michael A. Foti

Petitioner,

v.

Arlington County Board of Supervisors et al

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

BACKGROUND FOR QUESTIONS PRESENTED

Petitioner, after futilely exhausting the local and state remedies available to him while asserting his employment rights under his contract with employer, Chief Defendant Arlington County, brought suit in District Court in 1997 claiming invidious animus and continuous discriminatory violations of his civil rights attributable initially solely to his Italian heritage, extending throughout his tenure and post-retirement period up to and through the June 2 filing of his complaint. *Withrow v. Larkin 422 U.S. 35 (1975) Footnote* [3]. Petitioner alleged in his informal appeal brief that trial judge's initial conduct at hearing lacked the necessary impartiality to insure a fair process. Petitioner alleges that trial judge subsequently erred egregiously when he transformed what was advertised as a Federal Rules of Civil Procedure 12(b)(6) proceeding into a misapplied 28 U.S.C.A. Section 1915(d) process. The court compounded matters by failing to dispose of Petitioner's post-hearing Motions to Supplement the Record in a timely manner causing confusion and unnecessary delay which arguably led to procedural due process errors committed by the Clerk of the Appeals Court. Petitioner also faults the Court of Appeals for failing to acknowledge the errors and to take remedial action sought and clearly anticipated by the novice Petitioner, thereby allowing additional injury to Petitioner's appeal rights.

QUESTIONS PRESENTED

1. Where trial judge exhibited bias towards defendants then converted the Federal Rules of Civil Procedure Rule 12(b)(6) hearing into a 28 U.S.C.A. Section 1915(d) *in forma pauperis* proceeding resulting in a summary judgment order for defendants, did such actions serve to deny self-funded *pro se* petitioner due process of law and equal protection under the Fourteenth Amendment to the Constitution of the United States?

2. Where the trial judge in a belated post-hearing order denying all petitioner's motions to supplement the record admitted that in reaching his summary judgment decision — to dismiss on Statute of Limitations grounds — he did not rely upon any

statements made during the proceeding effectively rendering the official transcript and the court reporter's tape recording acquired by Petitioner moot, did such action deprive or preclude petitioner's rightful opportunity to prove on appeal allegations of an unfair hearing, again denying due process and equal protection of the laws under the Constitution?

3. Where the Clerk of the Court of Appeals by letter instructed Petitioner to later renew his Motion to Supplement the Record of the District Court with the Appeals Court, but then failed to allow Petitioner adequate time to re-file with the Court and instead filed the case with an Appeals Court panel for judgment without notice of any kind to the Petitioner, resulting in an incomplete record being forwarded for consideration, did such actions also serve to deny Petitioner his due process and equal protection rights?

4. Where the Court of Appeals subsequent to their judgment of March 23, 1998 issued a mandate thereby depriving Petitioner opportunity to Petition for Rehearing (FRAP 40) and Suggestion for Rehearing in banc (FRAP 35) after being fully informed by Petitioner of the procedural due process errors committed in the Clerk's Office relative to the case, did such actions again deny Petitioner due process and equal protection of the laws?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

Arlington County Board of Supervisors
Employees' Supplemental Retirement Board of Trustees
Alan V. Christenson, Director of Personnel
Sally Grove May
Ara L. Tramblian, Assistant County Attorney
Lisa Bryant Fowler, Assistant County Attorney
Irwin Mazin
Herbert E. Lane, Jr., MD

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PETITION FOR WRIT OF CERTIORARI

Michael A. Foti respectfully petitions the Court to review a judgment in this case from the United States Court of Appeals for the Fourth Circuit and a memorandum Opinion and Order issued by the United District Court for the Eastern District of Virginia.

OPINIONS BELOW

The March 23, 1998 per curiam opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, case number 97-2708, is unpublished and is reprinted in the Appendix to this Petition. The prior opinion of the United States District Court for the Eastern District of Virginia, Case No. CA-97-872-1-A and dated November 12, 1997, is unpublished and is reprinted in the Appendix to this Petition. The Order from the District Court of March 2, 1998 is reprinted in the Appendix to this Petition. The Order from the Court of Appeals of April 21, 1998, denying petition for rehearing and suggestion for rehearing in banc as untimely filed is reprinted in the Appendix to this Petition. The Order from the Court of Appeals of June 11, 1998, denying motion for reconsideration and an extension of time to file petition is reprinted in the Appendix to this Petition.

JURISDICTION

The Court of Appeals for the Fourth Circuit entered its per curiam judgment on March 23, 1998 and its mandate on April 14, 1998. The jurisdiction of this court in invoked under 28 U.S.C. Section 1254(1). The court of first instance jurisdiction was 28 U.S.C. 1331. Petitioner received 60-day extension from the Clerk of the Supreme Court via letter of June 10, 1998, reprinted in Appendix to this Petition.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States that guarantees due process and equal protection of the Law.

STATEMENT OF THE CASE

This matter concerns disputed related hearings, the first held in the Federal District Court for the Eastern District of Virginia in Alexandria, Virginia, on August 22, 1997, and the second being the belated subsequent per curiam judgment on the informal appeal of the initial decision by a panel of judges for the Court of Appeals for the Fourth Circuit in Richmond, Virginia on March 23, 1998. (*Matter of Fuchsberg* 426, N.Y.S. 2d 639 [Court of the Judiciary 1978]0. at 666, 667

Pro se petitioner whose employment by the Chief Defendant, Arlington County Board of Supervisors began in 1974, filed complaint on June 2, 1997 alleging employment and civil rights violations under 42 U.S.C.A. Sections 1981, 1983, 1985, and 1985(3) spanning over twenty (20) years of employment and post-retirement discrimination originating solely on the basis of Petitioner's Italian heritage. Defendants filed Motions to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure alleging Statute of Limitations violations. Petitioner countered by amendment alleging continuous violations doctrine and federal fraudulent concealment doctrine, either of which, if proven in this case, renders local statutes of limitations inapplicable. Hearing was held on August 22, 1997 in Alexandria, Virginia, Judge Raymond A. Jackson, Norfolk, Virginia, presiding.

Shortly after hearing, petitioner purchased a copy of the transcript from the Court Reporter of Record. Petitioner then filed complaint with District Court alleging transcript had mistakes and omissions which indicated a flawed instrument. Petitioner then negotiated with the Court Reporter for a copy of his tape recording for immediate comparison purposes and to buttress his subsequent

argument on appeal that the collegial, if not carnival, atmosphere created by trial court exacerbated the problematic courtroom procedures which marked the total process as an unfair hearing lacking requisite due process and equal protection. While Petitioner struggled with a reluctant Court Reporter for his tape, the District Court denied his complaint for failure to point out exact errors in transcript. Petitioner in response to the Court's assertions that he had not filed enough evidence filed a number of post-hearing informational and evidential memoranda with the District Court to which defendants, possibly sensing as Petitioner did, that the door was still ajar, filed appropriate responses. Petitioner notes here that none of the three (3) opposing attorneys filed Motions to strike, to dismiss, or to bar, which Petitioner intuited as evidence of filing in timely fashion under the "in some manner" exception. Additionally, Petitioner also filed Motion(s) for Writs of Mandamus which were denied.

On November 12, 1997, in a Memorandum Opinion and Order the Court, citing local Statute of Limitations violations invalidating all Petitioner's claims, granted defendants Summary Judgment *ex mero motu*. Petitioner filed Notice of Appeal and subsequently filed an informal appeal brief on January 12, 1998. Petitioner then filed Motions to Supplement the Record in the District Court. Petitioner's Motions to Supplement went unanswered resulting ultimately in significant delay in the appeals process. As a result of the omission on the part of the hearing judge, Petitioner was later required to forward a second set of Motions to Supplement the Record with the District Court.

On March 5, 1998, almost six (6) weeks after submitting the second set of Motions to Supplement, Petitioner received a copy of an order from the hearing judge, dated March 2, 1998, in which all Petitioner's second set of Motions to Supplement were denied. In an informational follow-up letter dated March 12, 1998, Petitioner clearly advised the Clerk of the Appeals Court of his plans to renew his Motion to Supplement the Record consistent with her instructions to Petitioner of January 16, 1998. The Record indicates that on or about March 12, 1998, Petitioner's case was forwarded, prematurely,

Petitioner alleges, given his instructions and understanding, by the Clerk to the Appeals Court for consideration.

On March 25, 1998, while *pro se* Petitioner was completing his Renewal Motion to Supplement the Record for the Appeals Court's consideration, which included a substantial memorandum in support of his motion, Petitioner received a copy of a Notice of Judgment on his appeal from the Clerk's Office, dated March 23, 1998, in which a panel of the Appeals Court affirmed the District Court's decision and denied oral argument. ↑ *State of Alabama* 667 F.2d 1364, at 1367 (Ct. App. 11th Cir. 1980). Dickerson v.

Petitioner in response filed a formal complaint with the Clerk of the Appeals Court citing procedural errors committed by that office, effectively usurping Petitioner's appeal rights. Petitioner albeit naively waited for a response to impolitic rebuke of the Clerk's office forwarded in frustration and righteous indignation for giving *pro se* Petitioner the "bum's rush" and "jumping the gun"; but an explanation was not forthcoming. Instead, on April 14, 1998, a mandate was issued by the Appeals Court through the Clerk's Office rendering Petitioner's subsequent post-mandate Petitions for Rehearing under FRAP 40 and/or Suggestion for Rehearing in banc, FRAP 35, untimely.

Made aware by the Clerk of the time limitations on petitioning for a writ of certiorari from this court, *pro se* Petitioner initiated the research and development appropriate to this undertaking. Concurrently, Petitioner filed a complaint against the District Court Judge for his alleged inappropriate actions at hearing and his subsequent post-hearing violation of Canon 3 of the American Bar Association Code of Judicial Conduct (1990). To wit: "A Judge should perform the duties of his office impartially and diligently." The neophyte Petitioner, realizing more preparation time was necessary, filed application for a 60-day extension with the Clerk of the Supreme Court for consideration by the Chief Justice. Petitioner's timely-filed but incorrect application was returned to him by the Clerk for reasons cited in the letter of June 10, 1998 (Appendix)Petitioner subsequently prepared this Petition for Writ of Certiorari under Supreme Court Rule 14.5 relating to a corrected

petition being timely filed and in good faith rendered when received no more than 60 days after date of Clerk's letter.

WHY CERTIORARI SHOULD BE GRANTED

First and foremost, petitioner argues that it is the morally correct thing to do under the circumstances. On a more mundane level, petitioner posits the following:

An objective reading of the transcript of hearing of August 22, 1997 even without the accompanying aid of the tape recording of hearing suggests if not demonstrates that there was an absence of full development of the facts and law. The conduct of the entire proceeding by the court contributed to a defective hearing process. Clearly, the petitioner was not allowed the opportunity to be heard in a meaningful manner at a meaningful time as required under U.S.C.A. Constitutional Amendments 5 and 14. (See *Burtneiks v. City of New York*, 716 F2d 982 (Ct. App. 2nd Cir.) (1983).

The hearing judge in deciding to hear from defendants counsel first may have been acting within his discretion. However, petitioner posits that he was on shakier ground when he would not allow pro se petitioner to respond to and/or rebut each of the three (3) attorneys in turn thereby allowing defendants to wildly speculate and surmise at leisure on the facts of the case which they readily admit were difficult for them to comprehend. (*Haines v. Kerner*, 404 U.S. 519 1972). Petitioner after enduring a full eighteen (18) transcript pages of uninterrupted conjecture featuring judge-attorney collegial colloquies mentally threw in the proverbial towel when the judge in a quizzical response to attorney Cary inquired: "He did not file for any benefits? What kind of problem does that pose? What kind of problem does that pose *for us*? (emphasize added) if he didn't file, didn't file for the benefits, *he's* (emphasize added) arguing about?" Tr. Page 12, lines 15 through 18.

Petitioner further propounds that hearing judge after stating on the record that he would "...hear from you all counsel, then I'm

going to hear from Mr. Foti" (Tr. Page 11, lines 21 and 22), instead proceeded to turn what was noticed as a Federal Rules of Civil Procedure Rule 12(b)(6) hearing into a U.S.C.A. 28 Section 1915(d) proceeding without grounds authorizing "piercing the (corporate) veil" to attack petitioner by way of prosecutorial questioning. (*Neitzke v. Williams* 490 U.S. 319 (1989), see Justice Marshall's excerpt from opinion for Majority in Appendix.) No opportunity was given by the court to allow petitioner rebuttal time, let alone equal time. Petitioner alleges that this one-sided procedure initiated by the Court was an ex parte action which the Court may have been blind to considering its fixation on statute of limitations violations.
at 326-28

Petitioner argues further that the court and defendant's coming into an inartfully pleaded case simply took the most convenient exit to dismissal which, of course, is statue of limitations. Judge Jackson, to the petitioner's prejudice, refused to seriously consider another scenario lest it might mitigate or in some way jeopardize this predisposition. For example, the court early on inquired of both Messrs. Dabbs and Cary if they knew of any continuous violations that might support petitioner's claims. Not surprisingly, neither attorney had any such substantive or intuitive knowledge. However, when petitioner suggested that the defendant's refusal to timely underwrite the compensable costs of his medical treatment constituted "continuous violations" given the prolonged repetitive nature of this practice, Judge Jackson cut him off. (See *National Linen Service v. McGuinn* 362 S.E.2d 187). at 189 [2]

at 525 [3] [6] • [7] 336

Judicial finessing, however, cannot dislodge the fact that at the time petitioner filed his complaint, (*Quinones v. Szorc* 771 F.2d 289 (Ct. App. 7th Cir. IL [1985] also *Jensen Press v. Ale* 326 S.E.2d 522 (Ct. App. 4th Cir. VA [1985]). his former employer was $3,000.00 in arrears on petitioner's psychotherapy payments and as noted, non-payment of medical bills was and remains a continuous problem for petitioner, who has been unable to replace his now deceased Acupuncturist (Kevin Andreae) and continue treatment for his back injury fearful of the strong possibility that a new practitioner will also go unpaid and demand payment from petitioner, or as in the case of his psychotherapist, threaten to discontinue treatment until arrearage is settled. (See *Fairfax Hospital v. DeLaFleur*, 270 S.E.2d

720 at 722) (Note: Kevin Andreae, moved his practice from Silver Spring, Maryland to Lynchburg, Virginia in 1996. Petitioner has gone untreated for over a year and one half). 722 [illegible]

Petitioner tried in vain to make the point that these delays, denials and outright infractions of the Act with regard to medical benefits on a chronic if not consistent basis constitute "continuous violations" and it has been established for twenty (20) years in Virginia that the local statute of limitations is not applicable to an action under guaranteed equal rights under the law where continuous discrimination, rather than a single discriminate act is alleged. 42 U.S.C.A. Section 1981. *White v. City of Suffolk,* 460 F. Supp. 516 (D.C. Va. (1978) at 520.

In the instant case, as in Bethel v. Jendoco Construction Corp., 570 F2d 1168 (Ct. App. 3rd Cir. Pa.) (1978), claims under statute guaranteeing equal rights to make and enforce contracts, Section 1981, cannot properly be dismissed on motion to dismiss for failure to state a claim on basis of limitation provisions in light of allegation that defendant's discriminatory acts continued to the present. At 1173-74.

In Powell v. Workmen's Compensation Board of New York State, plaintiff alleged that defendants had conspired to violate his civil and constitutional rights by hindering and delaying his just claim for compensation. The Court of Appeals held that Powell had the right to sue under the civil rights statues, which he did, asking for monetary damages for alleged conspiracy to deprive him of his constitutional rights by means of unlawful and dilatory tactics designed to hinder processing of his claim. In the instant case, petitioner has gone far beyond Powell, not only alleging hindrance and delay before granting of award by the Worker's Compensation Commission, but also a continuous pattern of delay, denial, and harassment since 1983, which he claims qualifies as continuous discriminatory violations grounded initially in racial animus and invidious discrimination based solely on his Italian heritage. 327 F.2d 131 (Ct. App. 2nd Cir.) at 135.

Petitioner's charge of fraudulent concealment on the part of chief defendant, Arlington County, and defendant Herbert E. Lane, Jr., M.D., also was not properly dismissed by District court. Early in 1994, petitioner searching his local Worker's Compensation File in the Arlington County Personnel Office during discovery of an upcoming Circuit Court hearing on insurance premiums petitioner alleged were unlawfully obtained from him by chief defendant, came upon a letter which he as a layman felt might be evidence of fraud on the part of his employer. (See letter of September 28, 1990 from defendant Sally Grove May to William S. Crawford, Jr. in appendix.) Since it was a communication between employer and the Virginia Worker's Compensation Commission regarding what seemed dubious information being forwarded by employer, at the Commission's behest, petitioner forwarded his "inkling" of wrong doing to them for legal action if required since the Commission has full authority to enforce its orders and protect itself from deception, i.e., fraud, subterfuge, etc. The Commission failed to respond to petitioner's concerns and to the best of his knowledge took no action (Hamilton v. Turner, 377 A2d 363 [Del. Super. 1977]). et.

Because of this "no comment, no action" stance on the part of the Commission, petitioner assumed that his misgivings, (i.e., inkling, hunch), fell short of evidence required to initiate legal action against employer. Petitioner, as noted in the transcript of August 22, 1997, when coming upon the "smoking gun" evidence in early June 1996, took matters into his own hand. Petitioner contacted lawyers in the metropolitan area hoping to entice, cajole, or enlist in some fashion counsel in order to file complaint. However, he was unsuccessful in establishing a financially viable lawyer-client relationship. As the record shows, petitioner was forced to become a pro se complainant.

The defendants, and subsequently the court by acquiescing, argued at hearing that petitioner's actions in 1994-95 via the Commission precluded by way of statute of limitations, a "second" chance to litigate on fraudulent concealment charges. Under Virginia law, action for fraud accrues when complaining party discovered fraud or by exercise of due diligence resonably should have discovered it. *Unlimited Screw Products v. Malm,* 781 F. Supp.

1121 (D.C. Va. 1991). Petitioner's understanding is that a cause of action can accrue only when there exists a claim capable of present enforcement. In *Stoleson v. United States,* 629 F2d 1265, (Ct. App. 7th Cir. 1980), the court stated that a layman's subjective belief regardless of its sincerity or *ultimate vindication* (emphasis added) is patently inadequate to go to the trier of fact. Furthermore, in *Gilmore v. Basic Industries, Inc.*, 337 S.E.2d 514, 517 (Supreme Court of Virginia 1987) plaintiff Gilmore's attorney stated in a letter to him that "quite frankly it appears to me that there is a scheme to defraud". The letter was held not conclusive as to whether plaintiff should have known of alleged fraud on the date of the letter. At 1126 [5] 357 At 1270 [5]

Because Mr. Foti at hearing made at least minimum allegations of fraudulent concealment, dismissal was not proper. Foti stated when he came into knowledge of the letters comprising fraud (plus defamation, conspiracy, etc.). Defendants at hearing could not legally defeat or properly defense his allegations simply by speculating or surmising on when this evidence could have come into his hands. Plaintiff stated that he came upon the letters through serendipitous circumstances — his attache case was stolen on May 21, 1996 — on June 5, 1996 as he desperately sifted through his Commission-held records for replacement evidence for an upcoming hearing before a Deputy Commissioner in Alexandria. Foti filed his complaint on June 2, 1997 within the one-year limitation provided for in Section 8.01-243.2. Code of Virginia (1950) (See Section noted in appendix).

As in *Chiapetta v. Clark Associates,* 521 A.2d 697 (Sup. Jud. Ct. Me. 1987), where the Supreme Judicial Court held that substantial issue of material fact existed concerning fraudulent concealment on part of agency, precluding summary judgment or statute of limitations grounds, it is clear as the transcript evidences that substantial issues of material fact existed precluding summary judgment, trial courts acquiescence notwithstanding. At 700 [7]

On a more personal note, Certiorari should be granted because Michael A. Foti, like several of the case plaintiffs noted herein, is of Italian heritage which he has alleged is the focal point of this case. Since 1988, with *Marco DeSalle v. Key Bank of Southern Maine,* 685

F.Supp. 282 (D.C. Me. 1988), the leading case in this ethnic journey to first-class citizenship, some courts, at least one, have stated that "Italo-Americans are an identifiable class" entitled to maintain action under (42 U.S.C.A.) Section 1981, for discrimination in making and enforcement of private contracts. Petitioner's case, admittedly unusual in its length and seriousness, is indicative of the problems faced day in and day out by 20,000,000 Americans in their pursuit of life, liberty and property, as in job property rights, at the end of the 20th century. For example, in *Cutting v. Muzzey,* 724 F.2d 259 (Ct. App. N.H. 1st Cir. 1984) a group of would-be home purchasers all with Italian surnames encountered bald racial animus from an eastern town planning board in their pursuit of the American dream—homeownership—in violation of their civil rights. More recent and more disturbing is *Bisciglia v. Kenosha Unified School,* 45F.3rd 223, (Ct. App. Wi. 7th Cir., 1995) where a district court in Wisconsin denied plaintiff motion for leave to file an amended complaint. In this second complaint, Bisciglia sought to state a claim under 42 U.S.C. Section 1981, based upon alleged discriminatory bias against him. The court denied his motion on the grounds that Section 1981 only applies to one's race and not on national origin or Italian heritage. That court was ignorant, it tuned out not only of *DeSalle* but also of *Saint Francis College et.al. V. Majid Ghaidan Al-Khazraji,* 481 U.S. G04, 95 L 2d 582, 107 S. Ct. 2022 (1987), which gave rise to the former decision. Jews, Arabs, East Indians, Spanish, Mexican-Americans, Hassidic Jews, even aliens, e.g., Vietnamese fishermen are protected under civil rights legislation.

This loyal, patriotic, hard-working segment of American diversity of whom the petitioner is representative requires the protection of the United States Constitution which only the imprimatur of the Supreme Court can guarantee.

WHY CERTIORARI SHOULD BE GRANTED II

Petitioner who was injured in an on-the-job compensable accident in May 1983 has had claimant dealings with the Virginia Worker's Compensation Commission and its system for over fifteen (15) consecutive years and posits that his experience with this state agency dovetails with the basic contentions in *John R. Dillard and*

willie william v. Industrial Commission of Virginia et.al., 416 U.S. 783, 40 L Ed 2d 540, 94 S. Ct. 2028 (1974), who challenged the constitutionality of then Rule 13 created by the Commission, which allows for suspension of award absent due process, i.e., notice of intention to suspend or hearing prior to initial cessation. Furthermore, petitioner alleges that his continuous violations claim addresses Worker's Compensation violations by chief defendant which are more than tangential but on point in Dillard Case. Change in condition terms have been amended over the intervening years providing employer with a new right rendering the rationale for Justice Powell's majority opinion obsolete and not representative of present day claimant's vulnerability. R+ 788-89, 796-98

Petitioner suggests that the Court revisit Dillard after almost twenty-five (25) years via the granting of Petitioner's Writ, not necessarily to question the constitutionality of Virginia's Worker's Compensation Act in toto, but to review its 1974 decision in light of changed circumstances which petitioner is prepared to outline in his brief.

CONCLUSION

Petitioner contends that the trial judge's conduct at hearing and the Court of Appeals decision to ignore Petitioner's protests relative to procedural law are so Constitutionally abhorrent as to evoke the intervention of the Supreme Court.

For the reasons stated herein, the Petition for Certiorari should be granted.

Respectfully submitted,

Michael A. Foti

Michael A. Foti
Pro se

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MIICHAEL A. FOTI,

Plaintiff,

v. **ACTION NO. 1:97cv872**

ARLINGTON COUNTY BOARD OF SUPERVISORS,
EMPLOYEE'S SUPPLEMENTAL RETIREMENT
BOARD OF TRUSTEES,
ALAN V. CHRISTENSON, Director of Personnel,
SALLY GROVE MAY,
ARA L. TRAMIBLIAN, Assistant County Attorney,
LISA BRYANT FOWLER, Assistant County Attorney,
IRWIN MAZIN,
and HERBERT E. LANE, JR.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' motion to dismiss, and Plaintiff's motion for leave to amend complaint. This matter was instituted before the Court on June 2, 1997, when Plaintiff Michael A. Foti filed a complaint alleging that the Defendants, the Arlington County Board of Supervisors, the Employee's Supplemental Retirement Board of Trustees, Alan V. Christenson, Sally Grove May, Ara L. Tramblian, Lisa Bryant Fowler, Irwin Mazin, and Herbert E. Lane, Jr., violated Plaintiff's civil rights during certain events connected with Plaintiff's employment by the County of Arlington and his subsequent retirement from the County's employ. Plaintiff asserted grounds for relief under various civil rights statutes. On July 15, 1997 all

Plaintiff's, save Ms. May, filed a motion to dismiss pursuant to Rule 120(b)(6) of the Federal Rules of Civil Procedure.[1] Defendant Sally Grove May has never been served with either the complaint or the amended complaint. Plaintiff filed a motion to amend his complaint on August 8, 1997. The amended complaint restated the allegations contained in the complaint regarding claims under 42 U.S.C. 5 §§1981, 1983, 1985, and 1985(3), and added further state law claims for defamation, fraud, and intentional infliction of emotional distress. The Court heard oral argument on the motions August 22, 1997.

Upon consideration of the pleadings and briefs all parties filed, as well as the arguments presented at the hearing, Plaintiff's motion to amend is granted and the amended complaint deemed filed.[2] Furthermore, the Court finds that all causes of action asserted in the Plaintiff's complaint are barred by the applicable statutes of limitations, and therefore Defendants' motion to dismiss is granted with regard to all appearing Defendants. Defendant May is dismissed with prejudice.[3]

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[1]Defendant Herbert E. Lane, Jr. was not initially included in the motion to dismiss filed on July 15, 1997; he subsequently joined the motion by praecipe on August 20, 1997.

[2]The Court notes that Plaintiff has filed a number of post-hearing memoranda related to the matter before the Court. These memoranda are not properly filed, nor are they properly before the Court, and consequently will not be considered.

[3]"Although a sua sponte dismissal of a pro se civil rights complaint prior to service is strongly disfavored, it is appropriate if the action is barred by the statute of limitations." *Washington v. Lenihan*, 1996 WL 345950, *2 (S.D.N.Y. 1996) (unpublished) *citing Baker v. Cuomo*, 58 F.3d. 814, 818 (2d Cir.) *rehearing granted in part* 67 F.3d 39 *cert. denied* 1 16 S.Ct. 488 *vacated in part on rehearing en banc* 85 F.3d 919 (2nd. Cir. 1996) (different grounds); *accord Parker v. Marcotte*, -- F.Supp. --, 1997 WL 469126, *6 n4 (C.D.Cal. 1997) *citing Columbia Steel Fabricators v. Ahlstrom Recovery,* 44 F.3d 800 (9th Cir.) *cert denied* 116 S.Ct. 178. All claims brought against Defendant May are clearly barred

I. Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. 91331, which grants the district courts original jurisdiction over "all civil actions arising under the... laws... of the United States." 28 U.S.C. §1331. Plaintiff has asserted claims under 42 U.S.C. §1981, §1983, §1985, and §1985(3). Additionally, Plaintiff has asserted state law claims. As these claims arise out of a common nucleus of operative fact and are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy," this

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by the applicable statutes of limitations, as discussed *infra*. It would serve no purpose to have the Plaintiff go through the motions of completing service to transform a dismissal without prejudice for failure to serve into a dismissal with prejudice for failure to state a claim. *Mitchell v. Fairman*, 1996 WL 420294, *6 n2 (N.D.III. 1996) (unpublished) *citing Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993), *cert denied* 114 S.Ct. 1057 *and Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1304 (7th Cir. 1988); *accord Sumrall v. Hughes*, 916 F.2d 710, 1990 WI, 156526, * * 1 n3 (4th. Cir. 1990) (unpublished). As dismissal of Defendant May is on the same grounds as those asserted in the motion of the served defendants, Plaintiff has had an opportunity to respond, thereby avoiding the potential unfairness of a sua sponte dismissal. *Id.*

In the alternative, the Court notes that Plaintiff has recently submitted a further motion, styled "request for declaration/order of sufficiency of service of process regarding Defendant Sally Grove May in the case at bar." Plaintiff moves the Court to find that service has been effected upon Defendant May. The Court would grant that motion for the limited purpose of deciding the motion to dismiss currently before the Court. The Court would then proceed to dismiss Defendant May despite the fact that she has not formally joined the motion to dismiss, as she is similarly situated to the moving defendants. *Rosser*, 864 F.2d at 1304 (citations omitted); *Bonny*, 3 F.3d at 162.

Court has the power to exercise supplemental jurisdiction over them. 28 U.S.C. S1367. Having examined the "considerations of judicial economy, convenience and fairness to litigants," the Court feels it is proper to exercise supplemental jurisdiction in the instant case. *United Mine Workers of America v. Gibbs,* 86 S.Ct. 1130, 1139, 383 U.S. 715, 726(1966).

II. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of actions that fail to state a claim upon which relief can be granted. When considering a motion under Rule 12(b)(6), "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). Furthermore, courts must assume the facts in the plaintiff's complaint to be true. *See Johnson v. Mueller,* 415 F.2d 354, 355 (4th Cir. 1969). The motion should only be granted if "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Id.* (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)); *see also Randall v. United States,* 30 F.3d 1130, 1 134 (4th Cir. 1993), *cert denied* 514 U.S. 1107 (1995).

III. Factual Background

Assuming that the facts Plaintiff alleged are true in ruling on this motion to dismiss, the background for this action is as follows. Plaintiff began work as a citizen services planner for Arlington County, Virginia, in January 1974. Immediately upon beginning employment, Plaintiff was subjected to hostility and discrimination from fellow employees based upon his Italian heritage. This discriminatory animus initially took the form of name calling and jokes. Once Plaintiff had achieved some advancement in his position, the simple hostile animus became, Plaintiff alleges, "conspiratorial ventures at a high staff level."[4] "In 1977 and 1978, Plaintiff filed job grievances against his supervisors based upon disputes over

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[4] Amended Complaint at 10.

promotions and delays in wage increases. These grievances resulted in various civil service commission hearings between 1977 and 1980. Plaintiff alleges the disputes that resulted in his filing of the grievances were caused by the actions of those conspiring against him, including Defendant Christenson and others. Plaintiff also alleges that in retaliation for his filing of the grievances, the conspirators attempted to constructively discharge him by giving him positions without responsibilities, and passing him up for promotions.

In May 1983, Plaintiff was injured while working, an injury that resulted in a short hospital stay. After the injury did not respond well to treatment, and due in part to the pressures caused by the alleged conspiracy, Plaintiff became depressed. In 1984, this eventually caused his orthopedic doctor to refer him to a psychiatrist.

After his injury in 1983, Plaintiff filed for worker's compensation. Plaintiff alleges that Defendant Fowler, at the direction of others involved in the conspiracy, illegally delayed and blocked Plaintiff's worker's compensation award until January of 1984, when Plaintiff received 500 weeks of worker' s compensation. Even after the award was granted, Plaintiff alleges, Defendant May and others conspired to delay or deny worker's compensation awards.

In 1985 Plaintiff applied for, and was denied, service-connected disability retirement from the Arlington County Employees Supplemental Retirement System. Plaintiff attributed the denial to the continuing conspiracy. Defendants Mazin and Tramblian recommended to the board that Plaintiff's application be denied, allegedly because Defendant Mazin felt Plaintiff's injury was "fake," and because of Plaintiff's previous disputes with the county attorneys during the 1977 and 1978 grievance procedures. Plaintiff appealed the denial of service-connected disability retirement to the Arlington County Circuit Court and the appeal was denied. Plaintiff did not retire at that time.

In 1990, still receiving worker's compensation and still under a doctor's care, Plaintiff retired from the employ of Arlington County. The rules of the Arlington County retirement system forced

Plaintiff's retirement. Plaintiff received a reduced pension benefit as a result of retiring under the proscribed age. On advice of counsel, who believed county officials would oppose any application, Plaintiff did not apply for, and did not receive, any supplemental benefits for his injury and continuing related medical problems.[5] Plaintiff applied for, and received, ordinary retirement benefits, reduced by the penalty for early retirement.

In 1990,1991 and 1992, Plaintiff alleges that Defendants May and Lane colluded to deny Plaintiff continuing worker's compensation benefits. In August of 1990, on the insistence of Defendant May and other conspirators, the Plaintiff submitted to a medical examination by Defendant Lane. Defendant Lane, on behalf of the county, wrote to the Worker's Compensation Commission challenging Plaintiff's continuing benefits. Plaintiff alleges that a number of the statements in this letter were false. At some point, the county stopped making worker's compensation payments to the Plaintiff. In 1991, the commission held change in condition hearings to review the question of Plaintiff's continued receipt of worker's compensation benefits.

In July of 1992 Plaintiff received a lump sum payment for back worker's compensation payments. In December of 1992, the payments were again stopped, as the county asserted that the 500 weeks of payments had ended. After Plaintiff challenged this assertion, he was awarded 10 additional weeks of payments. In early 1993, the worker's compensation payments ended.

In 1994, Plaintiff "recognized as damaging"a letter or letters that led him to suspect a conspiracy against him had been involved during the 1990 proceedings by the county.[6] In 1996, the Plaintiff discovered a further letter or letters relating to the alleged 1990

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[5]Amended Complaint at 25; Plaintiff's statements during August 22, 1997 hearing.

[6]Amended Complaint at 16; Plaintiff's statements during August 22, 1997 hearing.

conspiracy, which Plaintiff felt was the "smoking gun" proving a conspiracy had occurred.[7]

IV. Discussion

A. Motion to Amend

Under Fed. R. Civ. P. 15(a), leave to amend is properly freely given, unless there is a reason to deny the motion. *Manuel v. United States*, 846 F. Supp. 478, 480 (E.D.Va. 1994) (*citing Foman v. Davis*, 371 U.S. 178, 182 (1962)). This is particularly true in regards to *pro se* litigants. Accordingly, finding no reason to deny Plaintiff's request to amend, Plaintiff's motion for leave to amend the complaint is **GRANTED**, and Plaintiff's amended complaint is deemed filed. The Court therefore will consider Plaintiff's amended complaint when addressing the Defendants' motion to dismiss.

B. Motion to Dismiss

As an initial matter, the Court notes that Defendants have presented a number of grounds for dismissal in their collective motion to dismiss and their individual briefs in support. While the Court finds merit in many of the grounds asserted by the Defendants, as the statute of limitations is dispositive of all issues presented, the Court will not address those additional grounds for dismissal.

Plaintiff's amended complaint sets out six counts, comprising claims under 42 U.S.C.§§ 1981, 1983[8], 1985, and 1985(3),

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[7]Response to Motion to Dismiss at 17; Plaintiff's statements during August 22, 1997 hearing.

[8] Plaintiff's amended complaint does not explicitly set out a separate count for a §1983 claim; however, Plaintiff has referred to such a claim in the preliminary portions of the amended complaint, in the original complaint, and in other filings with this Court. Plaintiff's amended complaint does set out a count for "retaliation for the exercise of First and Fourteenth Amendment

defamation, fraud, and intentional infliction of emotional distress. The Court will address the proper, statute of limitations applicable to each of these claims, and then apply these limitation periods to the Plaintiff's claims.

C. Federal Statute of Limitations

As the statutes themselves do not provide their own statute of limitations, claims brought under 42 U.S.C. §§ 1981, 1983, 1985, and 1985(3) are governed by the applicable state limitations period for personal injury claims. *McCausland v. Mason County Board of Education*, 649 F.2d 278 (4th Cir. 1981). Claims brought under §1983 in Virginia are governed by Virginia's two-year statute of limitations for personal injury claims. Va. Code §8.01-243(A). *Wilson v. Garcia*, 471 U.S. 261, 266-269 (1985); *Lewis v. Richmond City Police Dept.*, 947 F.2d 733, 735 (4th Cir. 1991). Claims brought under §1981 are also subject to Virginia's two-year statute of limitations for personal injury. *McCrary v. Runyon*, 515 F.2d 1082, 1096-97 (4th Cir. 1975), *aff'd* 427 U.S. 160 (1976); *Williams v. Norfolk and Western Railway Co.*, 530 F.2d 539 (4th Cir. 1975); *Williams v. Enterprise Leasing Co.*, 911 F.Supp. 988 (E.D.Va. 1995). Similarly, claims brought under §1985 and §1985(3) are subject to the two-year statute of limitations for personal injuries. *McCausland*, 649 F.2d at 279; *Harris v. Obenshain*, 452 F.Supp. 1172, 1176 (E.D.Va 1978).

D. State Statutes of Limitations

Prior to 1987, claims brought for fraud in the Commonwealth of Virginia were governed by Va. Code §8.01-248, which provided for a one-year statute of limitations. *Purcell v. Tidewater Construction Co.*, 250 Va. 93, 95, 458 S.E.2d. 291, 292-93 (1995) citing *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179(1986). In 1987,

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rights." As this count requests monetary damages for the alleged retaliation, the Court will construe this count as one under §1983, as actions for monetary damages cannot be brought directly under the Constitution.

the General Assembly specifically provided that claims for fraud would be governed by Va. Code §8.01-243(A), which states "every action for damages resulting from fraud shall be brought within two years after the cause of action accrues." *Id.* at n.4. Claims for defamation were similarly governed by the one year limitations period contained in Va. Code §8.01-248 until 1995, when Va. Code §8.01-247.1 was enacted, providing that actions for "libel, slander, insulting words or defamation" must be brought within one year from the time the action accrues.[9] *Id.* at 95 citing *Wart v. McKelvie*, 219 Va. 645, 248 S.E.2d 826 (1978). Actions for the intentional infliction of emotional distress are governed by the two year limitations period for personal injury actions contained in §8.0124 3(A). *Luddeke v. Amana Refrigeration, Inc.*, 239 Va. 203, 207, 387 S.E.2d 502, 504 (1990); *Samuel v. Rose's Stores, Inc.*, 907 F.Supp. 159, 164 (E.D.Va. 1995).

V. Application of the Statutes of Limitations

Plaintiff has asserted that all of the individual events alleged in his complaint and subsequent pleadings are attributable to a single conspiracy or series of related conspiracies, and should therefore be considered a continuing violation. The Court has serious doubts that the facts as alleged would establish a continuing violation. However, the Court need not apply the test for the applicability of the continuing violation doctrine as set out in *Berry v. Board of Supervisors of Louisiana State University*, 715 F.2d 971 (5th Cir. 1983). *See Williams*, 91 1 F.Supp. at 995-98. The Court will instead accept, for purposes of this motion only, that the Plaintiff has indeed alleged facts sufficient to establish a continuing violation.

Plaintiff has not alleged that the Defendants have taken any action against him since his worker's compensation payments ended in 1993. "Under federal law a cause of action accrues when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." *Nasim v. Warden,*

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[9] In 1995, the general limitations period contained in Va. Code ~8.01-248 was increased to two years.

Maryland House of Correction, 64 F.3d. 951, 955 (4th Cir. 1995) (citations omitted). Similarly, in Virginia, a "cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained... and not when the damage is discovered." *Mahony v. Becker*, 246 Va. 209, 213, 435 S.E.2d 139, 141 (1993) *quoting* Va. Code §8.01-230. Plaintiff, as evidenced by his numerous administrative and state court proceedings, and by his own statements, clearly possessed sufficient facts about the harm done to him by each alleged violation that by 1993 reasonable inquiry would have revealed any cause of action. Nevertheless, Plaintiff claims that his discovery in 1994 and 1996 of certain letters pertaining to the alleged 1992 conspiracy should toll the statute of limitations. The Court need not decide if the "discovery rule" is properly applicable to the actions asserted in the instant case. Accepting *arguendo* that the discovery rule would apply in this situation, Plaintiff's cause of action would necessarily be deemed to have accrued no later than 1994. Plaintiff's own statements, both in his pleadings and during the hearing, indicate that he was aware of the alleged conspiracy at the latest once he discovered the 1994 letters.[10] The 1996 letters provided no more than additional evidence - the "smoking gun," in Plaintiff's words.[11] The "discovery rule," when applicable, only tolls the limitations period until the Plaintiff is on notice of the conduct or injury complained of; it does not serve to toll the limitations period until Plaintiff perfects his case. *See Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988); *Bireline v. Seagondollar*, 567 F.2d. 260, 263 (4th Cir. 1977) *cert. denied*[12] U.S. 842 (1979); *Pigott*, 231 Va. 76, 341 S.E.2d 179; *McHenry v. Adams*, 248 Va. 238, 448 S.E.2d 390. Therefore, for the purposes of this

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[10] Amended Complaint at 16; Plaintiff's statements during August 22, 1997 hearing.

[11] Response to Motion to Dismiss at 17; Plaintiff's statements during August 22, 1997 hearing.

motion, the Court finds that all causes of action relevant to the present action accrued no later than 1994.[12]

Applying the relevant statutes of limitations discussed *supra*, the Court notes that the longest applicable limitations period is two years. Plaintiff's action must therefore have been brought by 1996 at the latest in order to be timely. Plaintiff filed the instant action in 1997.

Plaintiff has repeatedly emphasized the continuing nature of the violations against him; however, "the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." *Nealon v. Slone*, 958 F.2d 584, 592 (4th Cir. 1992) *quoting United Airlines v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889 (1977). The fact that a number of related violations occurred over a span of time is not enough; some discriminatory act, some violation of law, must occur within the applicable limitations period. Plaintiff has failed to allege any discriminatory acts or violations suffered within the applicable limitation periods. Plaintiff has asserted that his continued receipt of retirement payments that are lower than the amount Plaintiff believes he is entitled to constitute present and continuing violations. The facts as Plaintiff asserts them, however, do not support such an assertion.

Plaintiff argues that his situation is analogous to the payment of discriminatory wages, which has been found by the Fourth Circuit to constitute a present and continuing violation. *See, e.g., Nealon*, 958 F.2d 584; *Brinkley-Obu v. Hughes Training, Inc.*, 36 F;3d 336(1994). The Court need not decide if the analysis of *Nealon and Brinkley-Obu* should properly be extended to the payment of discriminatory retirement benefits, however, as Plaintiff's own statements make clear that the instant situation does not involve the

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[12]In fact most, if not all, of Plaintiff's causes of action accrued prior to 1994. It is not necessary that the Court determine when each individual cause of action alleged accrued to decide this motion; consequently, the Court shall reserve decision on that question.

continuing and repeated denial of benefits to which Plaintiff is entitled.

Plaintiff applied for service-connected disability retirement in 1985. His application was denied, and Plaintiff did not retire at that time. This was an independent act; the fact that Plaintiff would eventually retire at a lower rate is not relevant, as it is simply the inevitable consequence of the denial. *See Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498 (1980). In 1990, when Plaintiff actually retired from the employ of Arlington County, he voluntarily chose upon advice of counsel not to apply for any type of supplemental benefits for his injury and continuing medical problems.[13] No Defendant denied Plaintiff additional retirement benefits at the time of his retirement - Plaintiff never applied. Therefore, Defendants performed no discriminatory act at the time of Plaintiff's retirement, and no discriminatory act occurs when Plaintiff receives retirement benefits that do not include payments for which he never applied. Taking Plaintiff's allegations in his pleadings as factual, Plaintiff cannot establish that any discriminatory act, or other violation, occurred within the applicable limitations period.

IX. Conclusion

Plaintiff has brought a number of claims. Even under the most generous application of the statutes of limitations and related doctrines, however, Plaintiff's claims are time barred, and therefore do not state a claim upon which relief can be granted. Consequently, the motion to dismiss filed by Defendants Arlington County Board of Supervisors, Employee's Supplemental Retirement Board of Trustees, Alan V. Christenson, Ara L. Tramblian, Lisa Bryant Fowler, Irwin Mazin, and Herbert E. Lane, Jr., is **GRANTED** with prejudice. Unserved Defendant Sally Grove May is **DISMISSED** with prejudice.

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[13]Amended Complaint at 25; Plaintiff's statements during August 22, 1997 hearing.

The Clerk is **DIRECTED** to send a copy of this order to Plaintiff *pro se* and to counsel for Defendants.

It is so **ORDERED**.

Raymond A. Jackson
s/ Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
November 12, 1997

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[12] In fact most, if not all, of Plaintiff's causes of action accrued prior to 1994. It is not necessary that the Court determine when each individual cause of action alleged accrued to decide this motion; consequently, the Court shall reserve decision on that question.

[13] Amended Complaint at 25; Plaintiff's statements during August 22, 1997 hearing.

APPENDIX B

United States District Court for the
Eastern District of Virginia

ORIGINALLY HANDWRITTEN

December 17, 1997

Michael A. Foti
Plaintiff

v. Case No. CA 97-872-A

Arlington County Board
of Supervisors, et al

Defendants

Motion for Court to Reconsider Its Position on Post-hearing Memoranda Filed by Plaintiff-Appellant and Responses Filed Subsequent Thereto

Plaintiff-Appellant requests that the Court reconsider its position decreed in the Memorandum Opinion and Order of November 12, 1997 in the above styled case regarding post-hearing memoranda filed by Plaintiff-Appellant subsequent to the pre-trial Hearing of August 22, 1997. These post-hearing memoranda should also include Plaintiff-Appellant's October 1, 1997 Request for Motion for Hearing on alternative request(s) for interlocutory injunction(s) and/or Writs of Mandamus to the Court and District Judge Albert V. Bryan, Jr.'s order of October 6, 1997 denying Plaintiff-Appellant's Request/Motion. Plaintiff-Appellant bases his request in the interest of justice and fair play.

Sincerely,
s/ Michael A. Foti
Michael A. Foti
Pro se

cc: File

APPENDIX C

December 18, 1997

Norman H. Meyer, Jr. Clerk
U.S. District Court for the
Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314

Michael A. Foti v. Arlington County Board of Supervisors, et al
Civil Action No. 97-872-A

Dear Mr. Meyer:

Enclosed please find for filing (1) Plaintiff-Appellant's request for a copy of Judge Raymond A. Jackson's Certification of Transcript of August 22, 1997 in the above styled case, and (2) Motion For Court to Reconsider its position on post-hearing memoranda filed by Plaintiff-Appellant and responses filed subsequent thereto. Noted in Footnote 2, Page 2 of the Memorandum Opinion and Order of November 12, 1997.

Sincerely,

s/ Michael A. Foti
Michael A. Foti
Pro se

cc: Dana L. Rust, Esq.
David F. Dabbs, Esq.
Thomas M. Hogan, Esq.
File

APPENDIX D

January 8, 1998

ORIGINALLY HANDWRITTEN

Transcript Errors and/or Omissions

Page 3, Line 5	I "AM" incorrect. Appellant stated I, Ah,
Page 3, Line 15	"REPLY" missing
Page 5, Line 3	"PRIOR", not "FILED"
Page 6, Line 13	"CLAIMS" not "COMPLAINTS"
*Page 6, Line 21	And "WILL CONSIDER" not CONSIDERED
Page 11, Line 17	"OK" missing
Page 13, Line 3	Not "CLEAR"
Page 23, Line 16	"OK" missing
Page 28, Line 10	"YEAH" should read "NO!"
Page 35, Line 23	"SIGNATURE" should read "SINECURE"

"MR. MAZIN" not "MAYSON"

*Important Point

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL. JR. U.S. COURTHOUSE ANNEX
1100 EAST MAIN STREET. SUITE 501
RICHMOND, VIRGINIA 23219-3538
PATRICIA S. CONNOR, CLERK **TELEPHONE (804) 771-1213**

January 16, 1998

Michael A. Foti
12700 Viers Mills Road
#304
Rockville, MD 20853

Re: 97-2708 Foti v. Arlington Cty Bd Sup
CA-97-872-1-A

Dear Counsel:

The Court is in receipt of your tape of 8/22/97. You must first file a motion to supplement the record with the district court before the tape can be made a part of the record. In the event the district court denies the motion to supplement, you may renew your motion in this Court. (Emphasis added.) I am enclosing the copy of the tape.

If you have any questions, I can be reached at 804-771-2903.

Yours truly,

PATRICIA S. CONNOR
Clerk
s/ Lisa Jernigan
By: _____
Deputy Clerk

cc: David Frederick Dabbs
Nelson David Cary
Thomas Michael Hogan

APPENDIX F

ORIGINALLY HANDWRITTEN

Michael A. Foti

January 23, 1998

Norman H. Meyer, Jr. Clerk
U.S. District Court for the
Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314

Michael A. Foti v. Arlington County Board of Supervisors, et al
Civil Action No. 97-872-A

Dear Deputy Clerk Solomon:

Pursuant to your request during our telephone conversation of yesterday afternoon I am enclosing file copies of my December 17 and 18 1997 Motions/Requests to the District Court Re: supplementation of the record for review by the U.S. Court of Appeals for the Fourth Circuit (their 97-2708 Foti v. Arlington County Bd Sup) which have not as yet been acted upon by the District Court.

Plaintiff-Appellant looks forward to timely execution of these motions/requests to facilitate the ongoing appeals process. (Emphasis added.)

Thank you for your assistance and cooperation in this vital matter.

Sincerely,
s/ Michael A. Foti
Michael A. Foti
Pro se

cc: File

APPENDIX G

ORIGINALLY HANDWRITTEN
Michael A. Foti
January 23, 1998

Ms. Lisa Jernigan
U.S. Court of Appeals for the Fourth District
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3538

RE: 97-2708 Foti v. Arlington Cty. Bd. of Sup. CA-97-872-1-A

Dear Deputy Clerk Jernigan:

Yesterday, January 22, I phoned your offices and spoke with a colleague, Ms. Merlene Taylor, Deputy Clerk, in your absence. The return of the tape of August 22, 1997 along with your short note prompted my call (letter dated January 16). For your information and the record I have enclosed copies of my Motions/Requests of December 17 and 18, 1997 to the District Court and my cover letter of today sent to Jo Solomon, Deputy Clerk, for timely attention, execution and return. Ms. Solomon, whom I spoke with late yesterday afternoon, stated that the record/file had already been forwarded to your Richmond offices. Unfortunately, no action on my Motions/Requests were taken by the District Court prior to forwarding. As I stated to Ms. Taylor I interpreted no response from the District Court as denial likened to a "pocket veto". But now as your copy evidences I have taken steps to secure an official response from the District Court. I am assuming that these delays will not redound to my disadvantage or prejudice in the appeals process at hand. (Emphasis added)

Additionally, I note that the Court of Appeals is including Mr. Nelson D. Cary, Esquire, as a Defense Counsel. Mr. Cary has dropped out and Dana L. Rust, Mr. David F. Dabbs' Associate, has entered the case as Defense Counsel.

Sincerely,

s/ Michael A. Foti
Michael A. Foti, *Pro se*

cc: File

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICHAEL A. FOTI,

Plaintiff,

v. **ACTION NO. 1:97cv872**

ARLINGTON COUNTY BOARD OF SUPERVISORS,
EMPLOYEE'S SUPPLEMENTAL RETIREMENT
BOARD OF TRUSTEES,
ALAN V. CHRISTENSON, Director of Personnel,
SALLY GROVE MAY,
ARA L. TRAMBLIAN, Assistant County Attorney,
LISA BRYANT FOWLER, Assistant County Attorney,
IRWM MAZIN,
and HERBERT E. LANE, JR.,

Defendants.

ORDER

This matter is before the Court on Plaintiff Michael A. Foti's "motion to supplement record," and Plaintiff's "motion for court to reconsider its position on post-hearing memoranda filed by plaintiff-appellant and responses filed subsequent thereto."

Plaintiff has appealed the Court's November 12, 1997 order granting summary judgement for Defendants. In his two motions, Plaintiff now wishes to supplement the record on appeal.

The record on appeal includes a transcript of the August 22, 1997 hearing before the Court. Plaintiff believes that the official

transcript contains certain errors.[14] Plaintiff now wishes to supplement the official record with a copy of a tape recording of the hearing.

Plaintiff does not explain, however, the need for such a recording. While the Court's order of November 12, 1997 does refer to statements made during the August 22, 1997 hearing, it does so only when those statements served to verify assertions made by the parties in their pleadings. The Court did not depend upon the transcript in deciding the issues presented, nor does the Court's ruling rely or rest upon the contents of the transcript or upon any statements made during the proceedings. Any errors in the transcript are purely collateral to the Court's ruling. The Court does not believe that the tape recording of the proceedings will in any way illuminate the legal questions on appeal, and therefore Plaintiff's motion to supplement record is **DENIED**.

The Court notes that Plaintiff's second motion, styled "motion for court to reconsider its position on post-hearing memoranda filed by plaintiff-appellant and responses filed subsequent thereto" is moot. The Court interprets Plaintiff's motion as requesting the addition to the record of certain memoranda filed by the Plaintiff after the August 22, 1997 hearing, as well as the responses filed by the Defendants. [15] In the Court's November 12, 1997 order, the Court noted that these filings were not properly before the Court, and were consequently not considered. However, as the filings were filed and entered into the record, those documents comprise part of the record already forwarded to the Fourth Circuit, for that court's consideration as it sees fit. Consequently, Plaintiffs motion is moot, and is therefore **DENIED**.

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[14] Plaintiff has not identified what specific errors he believes exist in the transcript.

[15] Plaintiff also makes reference to Judge Bryan's decision on Plaintiff's motion for interlocutory injunction and/or writ of mandamus. The status of Judge Bryan's order as comprising part of the official record of this case has never been in question; therefore the Court must dismiss this request as being both moot and frivolous.

The Clerk is **DIRECTED** to mail a copy of this order to Plaintiff and to counsel for the Defendants.

It is so **ORDERED**.

s/ Raymond A. Jackson
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
March 2, 1998

APPENDIX I

ORIGINALLY HANDWRITTEN
March 12, 1998

United States Court of Appeals for the Fourth District
1100 East Main Street
Richmond, Virginia 23219-3538

RE: 97-2708 Foti v. Arlington County Board of Supervisors
CA-97-872-1-A

Dear Ms. Jernigan:

Plaintiff-Appellant has been in receipt of Judge Raymond A. Jackson's Order of March 2, 1998 since the evening of March 6, 1998. Per your letter of instruction of January 16, 1998 Plaintiff-Appellant is preparing Motion to Supplement the Record for the Court's consideration. Said Renewal Motion will follow this Notice in a timely manner. (Emphasis added.) Thank you for your assistance.

Sincerely,
s/ Michael A. Foti
Michael A. Foti
Pro se

cc: David F. Dabbs
Diana L. Rust
Thomas M. Hogan
File

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 23, 1998

T0: Michael A. Foti
David Frederick Dabbs, Esq.
Nelson David Cary, Esq.
Thomas Michael Hogan, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 97-2708

The Court's decision is enclosed.

PETITION FOR REHEARING (FRAP 40)
SUGGESTION FOR REHEARING IN BANC (FRAP 35)

Filing Time — A petition must be received in the clerk's office within 14 days after judgment to be timely. There are three exceptions to this rule:

(1) In all civil cases in which the United States or an agency or officer thereof is a party, the time within which a party may seek rehearing shall be 45 days after entry of judgment.

(2) The Court may grant an extension of time or leave to file a petition for rehearing out of time if the party establishes that the delay resulted from the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or other circumstances wholly beyond the control of counsel or a party proceeding without counsel.

(3) Prisoner petitions are deemed filed when delivered to prison authorities.

If a suggestion for rehearing in banc is to be made, it must be filed at the same time and in the same document as the petition for rehearing.

Each case number to which the petition applies must be listed on the petition, even in companion or consolidated cases. Failure to list the Individual case numbers on the petition will result in the unidentified cases proceeding to mandate even if a timely petition for rehearing has been filed in a companion or consolidated case.

A timely filed petition for rehearing will stay the mandate and toll the running of time for filing a petition for writ of certiorari, but a suggestion for rehearing in banc, filed without a petition for rehearing, will accomplish neither of these.

Purpose A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A Change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. The opinion is in conflict with another decision of the Court or of another court of appeals and the conflict is not addressed in the opinion.

Statement of Counsel A petition shall contain an introduction stating that, in counsel's judgment, one or of Counsel more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel.

Form The 15 page limit allowed by the Rule shall be observed. The Court requires 4 copies of the petition (20 copies if it contains a suggestion for rehearing in banc); however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing Time	A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs on or before 4/6/98.

MANDATE (FRAP 41)

Issuance Time	Except in original proceedings before this Court when there is no mandate, the mandate is issued 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.
Stay	A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL JUSTICE ACT

CJA	Counsel appointed under the Criminal Justice Act must file their vouchers no later than 60 days after final disposition of the case. If no petition for certiorari is filed, the 60 days runs from the date of judgment. If a petition for certiorari is filed, the 60 days runs from the date of filing the petition.

PATRICIA S. CONNOR
CLERK

Enclosure

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2708

MICHAEL A. FOTI,

Plaintiff - Appellant,

versus

ARLINGTON COUNTY BOARD OF SUPERVISORS; EMPLOYEE'S SUPPLEMENTAL RETIREMENT BOARD OF TRUSTEES; ALAN V. CHRISTENSON, Director of Personnel; SALLY GROVE MAY, Personnel; ARA L. TRAMBLIAN, Assistant County Attorney ; LISA BRYANT FOWLER, Assistant County Attorney; IRWIN MAZIN; HERBERT E. LANE, JR.,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Raymond A. Jackson, District Judge. (CA-97-872-1-A)

Submitted: March 12, 1998 Decided: March 23, 1998

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael A. Foti, Appellant Pro Se. David Frederick Dabbs, MCGUIRE, WOODS, BATTLE & BOOTH, L.L.P., Richmond, Virginia; Nelson David Cary, SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, Washington, D.C.; Thomas Michael Hogan, GODARD, WEST & ADELMAN, Fairfax, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellant appeals the district court's order dismissing his action alleging a number of claims arising out of his former employment. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Foti v. Arlington County Bd. of Supervisors, No. CA-97-872-1-A (E.D. Va. Nov. 14, 1997). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX K

ORIGINALLY HANDWRITTEN

April 2, 1998

Patricia S. Connor, Clerk
U. S. Court of Appeals for
The Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

RE: 97-2708 Foti v. Arlington County Board of Supervisors, CA-97-872-1-A

Dear Ms. Connor:

It would appear that someone in the Court of Appeals "Jumped the gun." I have been at a loss for words since receiving your Notice of Judgment of March 23, 1998. I have carefully gone through my correspondence with your office in an attempt to comprehend what went wrong. My last letter to your office went to Deputy Clerk Lisa Jernigan (see copies of my correspondence enclosed) and was dated March 12, 1998. In this letter I acknowledged receipt as of March 6, 1998 of District Court Judge Raymond A. Jackson's ORDER of March 2, 1998. And per the letter of instruction of January 16, 1998 fro n Ms. Jernigan (see copy enclosed) I began to prepare my Motion formally, to supplement the Record of the Hearing of August 22, 1998 for the Court's consideration. I believe I made it as clearly as I possible could that "said renewal (of my Motion to Supplement the Record with the Usual and Normal Memorandum in Support of Request) Motion will follow this Notice in a timely manner." My letter of March 12, 1998 was not a "Renewal of Motion"; it was simply what it was — an informational-only "heads up" communication conveying my upcoming action. Ironically, my letter was sent to avoid any misunderstanding about my intentions. It turns out to be a most prudent action on my part. The *pro se* Appellant, speaking from my experience, has been given the "bum's rush" treatment by the Administrative and Judicial decision systems from the onset due almost solely to the fact that he is *pro se* notwithstanding the bilge found throughout the Virginia Worker's

Compensation Act and *pro se* civil rights claims sensitivity towards *pro se* complainant's solicitous treatment. Appellant's case being a prime example of boiler plate concern honored more in the breach than in the observance. For your staff's information I am not *in forma pauperis* nor ever made claim to be. I have paid in my persistence for my day in Court throughout these years with blood, sweat, yes, and tears along with all financial expenses. A Court of Law should literally be turned into a "Laugh-In" session for lawyers and, yes, judges at the expense of rag tag *pro se* appellants/claimants such as the writer who was the butt of the mockery called a Hearing on August 22, 1997. The emotional distress and anxiety Judge Jackson and now your office has caused me is incalculable. I do believe, and the record will manifest, that my constitutional rights to due process, equal protection of the laws, etc., have yet once again been seriously violated. I now find myself in the unenviable position of alleging violations of my due process and equal protection rights against the Court of Appeals while litigating civil rights violation based on lack of due process and equal protection due to intentional discrimination in employment solely because of ancestry or ethnic characteristics, i.e., so-called Italo-American, a member of an "identifiable class" protected under 42 U.S. C Section 1981 against discrimination in making and enforcement of private contracts. It now appears to the Plaintiff that the harder he struggles to first obtain and then retain his constitutional rights already violated the more the supposed judicial/remedial system is bound and determined to thwart him. Again, it appears the legal system cannot get past *pro se* Appellant's lack of accreditation. Bluntly — no legal credentials, no respect. The pattern of resistance if not discrimination against the *pro se* Appellant appears always the same. The *pro se* Complainant's words fall on the turned off if not deaf ears of the Judge regardless of merit or logic. We can't have any bruised legal egos. The judge will not embarrass a lawyer, e.g., signify merit or logic to *pro se* litigant's position or logic of argument in open court facts or merit notwithstanding. As Judge Jackson made perfectly clear not only at hearing on August 22, 1997 but also in his ORDER of March 2, 1998 — his decision was not based on what took place at Hearing because his decision had been arrived at before the farce of August 22, 1997 commenced. The "hearing" was required by Law and the Law must at least go through the motions of due

process. First decision, then trial. But at all costs, do not let anyone hear what actually took place at hearing even if the *pro se* party, the one the courts are so solicitous of, strenuously objects to the adaptation or characterization of what took place at hearing intoned in the Court Reporters purported verbatim transcript of said hearing. A *pro se* party, the little fellow that the courts are so concerned about getting fairly heard, is required by the District Court to pick out the exact errors, omissions or mistakes made in the transcript, something an experienced lawyer might have trouble doing. But what if the *pro se* Plaintiff obtains a tape recording (copy) of the hearing made by the Court Reporter? In the interest of justice — after all, that's what legal hearings are all about, aren't they — and accuracy and conciseness, wouldn't it be the better practice to check with the "original source" when there's a dispute? Wouldn't the tape from which the Court Reporter fashioned the official transcript be the "best possible evidence"? Appellant argues that the question(s) answers itself. *Pro se* Appellant charges that under the circumstances Judge Jackson's denial of his request/motion to include the tape recording is manifestly unreasonable and smacks of censorship by the District Court — a violation of *pro se* Appellant's First Amendment Rights!

Judge Jackson along with the Defendants with whom Appellant alleges the Court allied itself most unseemly from the outset of the hearing of August 22, 1997 throughout these proceedings have constantly held the plaintiff to the highest standards of legal knowledge and business acumen a layman could aspire to despite his certified mental disability status with both the Worker's Compensation Commission of Virginia and the Social Security Administration. In all candor and conscience, how can the Court of Appeals lend themselves to such a false representation by the District Court of the mental-physical condition of the Appellant which an abbreviated-few-moments- of the opening exchange on the tape between an obviously weakened Appellant and the Court would belie? The Court of Appeals reading the transcript while listening to the tape recording of the hearing of August 22, 1997 must come to the ineluctable conclusion/deduction that the only interest that the denials of Judge Jackson can serve are not justice but his own. Let the sun shine in. And please stop this railroading. Appellant can

only do (limited) work each day on one deadline at a time. Due solely to the Court's "bums rush" policy towards *pro se* Complainants ostensibly aimed at "frivolous" and "malicious" *pro se* prisoners *in forma pauperis* maunderings, but in reality directed at all *pro se* civil rights complainants typified by Appellant's experience with the District Court and compounded by the carelessness/nastiness in your office Appellant was blind-sided by the Notice of Judgment of March 23, 1998 (97-2708) regarding Petitioning for Rehearing (FRAP 40) etc. — The Appellant's position is that (1) he was not "heard" in the District Court in any sense of the word because the Court was not interested in anything Appellant would have said; it might interfere with the Judge's foreordained neat and uncomplicated all-inclusive opinion that solves everyone's problems but the much-maligned Appellant's — Statute of Limitations running violations. The only problem with that is the pesky "continued discrimination violations" which defeats all Statute of Limitations. That can be gotten around. The court aligns itself with the Defendant and cuts off an unassertive if not confused Plaintiff whenever he's about to make his point. What's not on the "Record" per se cannot be used in the appeal process unless the Appeals Court allows supporting documentation and the Court, District, that is, will deny any Requests/Motions for supplementation by the Appellant and "ask" that the Court of Appeals do likewise. They're good ole boys and will be happy to oblige a colleague and we have a done deal. Not quite. How does this square with "an opportunity to be heard at a reasonable time and in a reasonable manner" when the issue has been decided before hearing and the Appellant/Plaintiff is only allowed to expound on selected subjects chosen by the Court, questioned by the Court in a hardly reasonable manner but one befitting or more suited to a prosecutor hammering at a hostile witness — not a *pro se* civil rights Plaintiff — while being continuously interrupted and/or abruptly cut off by the Court long after the Court and "grown-up" (Defendant's lawyers have had their adult conversation to which the Appellant-Plaintiff was not invited to participate although he was the sole subject of the conversation!

Now that the Court of Appeals has been fully and properly advised of the situation(s) Appellant finds himself in, I trust the remedy(s) the Court will suggest/offer will be sufficiently just and generous enough to solicit my immediate and complete cooperation.

Sincerely,
s/ Michael A. Foti
Michael A. Foti
Pro se Appellant

Enclosures

cc: Dabbs
Rust
Hogan

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 14, 1998

No. 97-2708
CA-97-872-1-A
Foti v. Arlington Cty Bd Sup

MANDATE

The judgment of this Court dated 3/23/98 takes effect today.

PATRICIA S. CONNOR
CLERK

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL. JR. U. S. COURTHOUSE ANNEX
1100 EAST MAIN STREET. SUITE 501
RICHMOND, VIRGINIA 23219-3538
PATRICIA S. CONNOR **TELEPHONE (804) 771-1213**
CLERK

April 20, 1998

Michael A. Foti
12700 Viers Mills Road
#304
Rockville, MD 20853

Re: 97-2708 Foti v. Arlington Cty Bd Sup., CA-97-872-1-A

Dear Mr. Foti:

We have received your informational letter dated 4/15/98.

This Court's Local Rule 40(d) states that, except for timely suggestions for rehearing in banc, cost and attorney fee matters and other matters ancillary to the filing of an application for writ of certiorari with the Supreme Court, the Office of the Clerk shall not receive motions or other papers requesting further relief in a case after the court has denied a petition for rehearing or the time for filing a petition for rehearing has expired.

This office is returning your letter pursuant to the provisions of Local Rule 40(d).

I enclose for your information a sheet outlining the procedures for applying to the Supreme Court of the United States for a writ of certiorari.

Sincerely,
PATRICIA S. CONNOR, Clerk
s/ Merlene Smith-Taylor
By: _____
Deputy Clerk

Enclosure(s)

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 21, 1998

No. 97-2708
CA-97-872-1-A

MICHAEL A. FOTI

Plaintiff - Appellant

v.

ARLINGTON COUNTY BOARD OF SUPERVISORS; EMPLOYEE'S SUPPLEMENTAL RETIREMENT BOARD OF TRUSTEES; ALAN V. CHRISTENSON, Director of Personnel; SALLY GROVE MAY, Personnel; ARA L. TRAMBLIAN, Assistant County Attorney; LISA BRYANT FOWLER, Assistant County Attorney; IRWIN MAZIN; HERBERT E. LANE, JR.

Defendants - Appellees

ORDER

Appellant has filed an untimely petition for rehearing and suggestion for rehearing in bane. This Court strictly enforces the time limits for filing petitions for rehearing and suggestions for rehearing in banc.

The Court denies the petition for rehearing and suggestion for rehearing in banc as untimely filed.

For the Court - By Direction
s/ Patricia S. Conner, Clerk

APPENDIX O

ARLINGTON COUNTY, VA, PERSONNEL DEPARTMENT
#1 COURTHOUSE PLAZA, STE 511
2100 CLARENDON BLVD, ARLINGTON, VA 22201

September 28, 1990

William S. Crawford, Jr.
Assistant Claims Examiner, Industrial Commission of Virginia
P.O. Box 1794
Richmond, VA 23214

Re: Michael Foti; IC#: 110-34-74; Cty File #: 83-015;D/A: 05/17/83

Dear Mr. Crawford:

In response to your letter of September 24, 1990, Mr. Foti has been sent a copy of Dr. Lane's medical report. We only just received it this week and forwarded it to him yesterday. I have enclosed another copy to ensure its receipt.

Regarding the health spa, Mr. Foti was reimbursed by check #511630, mailed to him July 25, 1990. If he did not receive this check, he should notify my office at once. Concerning his transportation, it simply is not true the County has neglected to pay him. We have reimbursed every expense submitted, the last reimbursement was on September 5th. These payments include taxis, parking, metro fares and buses. Again, if he does not believe he has been reimbursed, he should submit the expense to our office.

If you should have any further questions concerning this matter, please do not hesitate to contact me at the above address or by telephone at (703) 358-3472.

Most sincerely,
s/ Sally Grove May
Sally Grove May
Workers' Compensation & Insurance Spec.

encl.

CC: Michael Foti, Workers' Compensation File

APPENDIX P

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK WASHINGTON, DC 20543-0001
WILLIAM K. SUTER AREA CODE 202 479-3011
CLERK OF THE COURT June 10, 1998

Michael A. Foti
12700 Veirs Mill Rd. #304
Rockville, MD 20853

RE: Foti v. Arlington County Board of Supervisors, et al
(USAP4 No. 97-2708)

Dear Mr. Foti:

The above-entitled petition for writ of certiorari was received June 10, 1998. The papers are returned for the following reason(s):

No motion for leave to proceed *in forma pauperis*, signed by the petitioner or by counsel, is attached. Rules 33.2 and 39. The motion must be signed.

No notarized affidavit or declaration of indigency is attached. Rule 39. You may use the enclosed form.

The petition fails to comply with the content requirements of Rule 14, in that the petition does not contain:

The reasons relied on for the allowance of the writ. Rules 10 and 14.1(h).

In Forma Pauperis petitions must be on 8½ x 11 paper pursuant to Rule 33.2. Petitions should be stapled in the upper left-hand corner and not bound. Rule 33.2.

Please correct and resubmit as soon as possible. Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202 479-3011
June 10, 1998

A copy of the corrected petition must be served on opposing counsel.

You must provide an original and 10 copies of your petition for a writ of certiorari and motion for leave to proceed *in forma pauperis*. Rule 12.2.

Sincerely,
William K. Suter, Clerk
By:
s/ Clayton R. Higgins, Jr.
Clayton R. Higgins, Jr.
(202) 479-3019

Enclosures

cc: David F. Dabbs
Thomas M. Hogan

APPENDIX Q

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 11, 1998

No. 97-2708
CA-97-872-1-A

MICHAEL A. FOTI

Plaintiff - Appellant

v.

ARLINGTON COUNTY BOARD OF SUPERVISORS; EMPLOYEE'S SUPPLEMENTAL RETIREMENT BOARD OF TRUSTEES; ALAN V. CHRISTENSON, Director of Personnel; SALLY GROVE MAY, Personnel; ARA L. TRAMBLIAN, Assistant County Attorney; LISA BRYANT FOWLER, Assistant County Attorney; IRWIN MAZIN; HERBERT E. LANE, JR.

Defendants - Appellees

ORDER

By order dated 4/21/98, the clerk denied appellant's petition for rehearing and suggestion for rehearing in bane as untimely. Appellant has filed a motion for reconsideration of the clerk's order and for an extension of time to file petition for rehearing.

The Court denies the motion for reconsideration and an extension of time to file petition.

Entered at the direction of Judge Michael with the concurrence of Judge Luttig and Judge Williams.

APPENDIX R

MODEL CODE OF JUDICIAL CONDUCT (1990) CANON 3 A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.

... (5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary: A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Judicial bias, as perceived by parties or lawyers in the proceeding, jurors, the media and others, may be manifested by nonverbal communication such as facial expression and body language as well as by words. A judge must be alert to avoid such prejudicial behavior...

... (8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary: In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and

to insist that court officials, litigants and their lawyers cooperate with the judge to that end...

APPENDIX S

EXCERPT OF JUSTICE MARSHALL'S OPINION/NEITZKE

Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Conley v. Gibson,* 355 U.S. 41, 46-46 (1957). This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon, supra,* at 73, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one. What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support.[6]

Section 1915(d) has a separate function, one which molds rather differently the power to dismiss which it confers. Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that

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[6] A patently insubstantial complaint may be dismissed, for example, for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). See, *e.g., Hagans v. Lavine,* 415 U.S. 528, 536-537 (1974) (federal courts power to entertain claims that are "'so attenuated and unsubstantial as to be absolutely devoid of merit'") (citation omitted); *Bell v. Hood,* 327 U.S. 678, 682-683 (1946).

the defendants are immune from suit, see, *e.g.*, *Williams v. Goldsmith*, 701 F. 2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist, like respondent Williams' claim that his transfer within the reformatory violated his rights under Due Process Cause. Examples of the latter class are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar.

APPENDIX T

CODE OF VIRGINIA

Article 3.

Personal Actions Generally.

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

— A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered. (Emphasis added.)

However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues, except that the provisions of § 8.01-229 A 2 shall apply to toll the statue of limitations in actions brought by or on behalf of a person under a disability. (Code 1950 § 8-24; 1954, c. 589; 1973, c. 385; 1977, c. 617; 1986, cc. 389, 454; 1987, cc. 294, 645, 679.)

3. Civil Rights Actions.

Applicable to all civil rights actions, etc. — The two-year statue of limitations provided in this section would be applicable to a former railroad brakeman's cause of action brought under the section of the Civil Rights Act providing for civil action for deprivation of rights and providing for equal rights under the law for all persons within the jurisdiction of the United States, Steward v. Norfolk, F. & D. Ry., 486 F. Supp. 744 (E.D. Va. 1980), aff'd, 661 F.2d 927 (4th Cir. 1981).

State statute of limitations for personal injury actions usually determines timeliness.— The Reconstruction Civil Rights Acts create causes of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. As a consequence, it is the state statute of limitations for personal injuries which is usually looked to in determining when claims are time barred. United Steelworkers v. Dalton, 544 F. Supp. 291 (E.D. Va. 1982).

This section applies to actions under 42 U.S.C. § 1981. White v. City of Suffolk, 460 F. Supp. 516 (E.D. Va. 1978).

But the local statute of limitations is not applicable when continuous discrimination, rather than a single discriminatory act, is alleged. White v. City of Suffolk, 460 F. Supp. 516 (E.D. Va. 1978). (Emphasis added.)

In 42 U.S.C. § 1983 actions, statutes of limitations are borrowed from state law, United Steelworkers v. Dalton, 544 F. Supp. 291 (E.D. Va. 1982).

Suits brought pursuant to 42 U.S.C. §§ 1983 and 1985, are governed by this section. Buntin v. Board of Trustees, 548 F. Supp. 657 (W.D. Va. 1982).

Code of Virginia, Workers' Compensation, page 604:

§ 65.2-603. Duty to furnish medical attention, etc., and vocational rehabilitation; effect of refusal of employee to accept. — A. 1. As long as necessary after an accident, the employer shall furnish or cause to be furnished, free of charge to the injured employee, a physician chosen by the injured employee from a panel of at least three physicians selected by the employer and such other necessary medical attention… (Emphasis added.)

Code of Virginia, Workers' Compensation, page 606:
I. GENERAL CONSIDERATION.
... **Purpose.** — This section does not direct or authorize an employer to require an employee involved in an accident to seek medical attention. Rather, it prescribes the duties and responsibilities of an employer when an employee is injured in an industrial accident. West v. Beach Ford, Inc., No. 0592-94-1 (Ct.of Appeals Feb. 21, 1995).

Purpose of this section is twofold: To place the cost of medical care on the employer and to restore the employee's good health so that he may return to useful employment soon as possible. Richmond Mem. Hosp. v. Allen, 3 Va. App. 314, 349 S.E.2d 419 (1986).

Requirements of section read into employment contract. — The requirement of this section that the employer furnish and the employee accept medical attention is read into the employment contract between them. (Emphasis added.) Immer & Co. v. Brosnahan, 207 Va. 720, 152 S.E.2d 254 (1967), citing Glassco v. Glassco, 195 Va. 239, 77 S.E.2d 843 (1953) and commented on in53 Va. L. Rev. 1783 (1967).

Medical attention is part of compensation. — The medical attention and hospitalization which the employee is entitled to receive and the employer is required to furnish by this section is incidental to and a part of the compensation to which the employee is entitled under the Act; and the employer is only liable for medical and hospital charges where the employee is entitled to compensation Merrimac Anthracite Coal Corp. v Showalter, 158 Va. 227, 163 S.E. 73 (1932)....

Code of Virginia, Workers' Compensation, page 607:
...**The duty of the employee, once he obtains an attending physician, is to accept such necessary medical attention** as the nature of the accident may require. Davis v. Brown & Williamson Tobacco Co., 3 Va. App. 123, 348 S.E.2d 420 (1986)....

Code of Virginia, Workers' Compensation, page 608 :
...**Neither employer nor insurer may limit referrals by treating physician.** — A long held principle of the Compensation Commission, founded on this section, is that medical management of the claimant is to be directed by the treating physician, not by an employer's representative. Neither the employer nor its insurance carrier may limit the treating physician in the medical specialist, or

treating facilities to which the claimant may be referred for treatment. (Emphasis added.) Press v. Ale, 1 Va. App. 153, 336 S.E.2d 522 (1985).

When employer responsible for expense of referral. — So long as a casual relationship between the industrial accident and the complaints which are the subject of the referral is shown, the employer is financially responsible for the medical attention which the attending physician deems necessary, subject to review by the Commission. Press v. Ale, App. 153, 336 S.E.2d 522 (1985); Volvo White Truck Corp. v. Hedge, 1 Va. App. 195, 336 S.E.2d 903 (1985)...

Code of Virginia, Workers' Compensation, page 609:

... **Expenses of treatment at pain clinic.** — Whether the employer is responsible pursuant to this section for past and future expenses of physicians and specialists at a pain clinic depends upon: (1) Whether the treating physician made a medical referral of the patient; and (2) whether such other medical attention was necessary. Press v.Ale, 1 Va. App. 153, 336 S.E.2d 522 (1985)...

... **In cases of conflicting medical evidence, the general rule** is that when an attending physician is positive in his diagnosis, great weight will be given by the courts to his opinion. Bill Branch Coal Corp. v. Cantrell, No. 1547-93-3 (Ct. Of Apeals Dec 21, 1993)...

Code of Virginia, Workers' Compensation, page 610:

...**Additional injury received while seeking medical attention for work-connected injury.** — When the employer directs or authorizes the employee to seek medical attention for a work-connected injury and the employee follows such direction or authorization, they are but fulfilling the reciprocal obligations of the Act and their contract. To say that an additional injury, suffered by an employee while fulfilling such an obligation, is not also work-connected has little support in modern legal authority and even less in logic. Immer & Co. v. Brosnahan, 207 Va. 720, 152 S.E.2d 254 (1967), citing Glassco v. Glassco, 195 Va. 239, 77 S.E.2nd 843 (1953) and commented on in 53 La. L. Rev. 1763 (1967)...

APPENDIX U

§ 1915. Proceedings *in forma pauperis*

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United Stares Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

APPENDIX V

JURISDICTION

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat 662.)

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX W

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(R.S. § 1977; Pub.L. 102-166, Title I § 101,. Nov. 21, 1991, 105 Stat. 1071)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting

or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; Intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely. fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or

property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. 9 1980.)